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Nos. 366-367

In the Supreme Court of the United States

OCTOBER TERM, 1947

BAY RIDGE OPERATING CO., INC., PETITIONER

v.

JAMES AABON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, AND NATHANIEL TOLBERT

HURON STEVEDORING CORP., PETITIONER

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN MCGEE, JOSEPH SHORT, ALONZO E. STEELE, AND WHITFIELD TOPPIN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of Bay Ridge Operating Co., Inc., and Huron Stevedoring Corp.,[1] prays that writs of certiorari issue to review the judgments entered in the above-entitled

[1] The Solicitor General is appearing on behalf of petitioners because, in accordance with wartime "cost plus" contracts entered into between the United States and petitioners, the United States will ultimately have to pay such judgments

cases by the United States Circuit Court of Appeals for the Second Circuit reversing the judgments entered by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 581–591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654–659) is reported at 162 F. 2d 665.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 3, 1947 (R. 665–667). A petition for rehearing filed by petitioners (R. 667–670) was denied by an order of the court entered on June 24, 1947 (R. 671–672). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

From 1916 to date, industry-wide collective bargaining agreements covering the terms and conditions of employment in the New York longshore industry (1) have prescribed periods of

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as may here be rendered against petitioners. During World War II, the operation of all ships was taken over by the United States and substantially all stevedoring was performed for the account of the Government (R. 603).

specifically scheduled hours on weekdays;[2] (2) have provided that all work within such scheduled hours was to be paid for at agreed hourly rates (herein referred to as "straight time" rates); and (3) have provided that all work outside such scheduled hours on weekdays and all work on Sundays and holidays was to be paid for at higher hourly rates which, with minor exceptions, were one and one-half times the rates applicable to work during the scheduled hours (herein referred to as "overtime" rates). Longshoremen worked within and without the "straight time" hours in varying proportions. The issue in these cases is what were the "regular rates" at which the longshoremen were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTES INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

> No employer shall * * * employ any of his employees who is engaged in com-

[2] The scheduled hours under the 1916 agreement were 7:00 a. m. to 12:00 m. and 1:00 p. m. to 6:00 p. m. on Mondays through Saturday, inclusive, making a 60-hour week. In 1917, the scheduled daily hours were reduced to nine, and the workweek reduced to 54 hours. In 1918, the eight-hour day and Saturday half-holiday were achieved, making a 44-hour week. This arrangement continued (except for a period of lessened union power between 1922 and 1927, when Saturday afternoon work was resumed for all or some months of the year) until 1946, when the full Saturday holiday and a resultant 40-hour week were established.

> merce * * * for a workweek longer than forty hours * * *: unless such employee receives compensation for his employment in excess of * * * [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.

Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069, 29 U. S. C. 216 (b)) provides, in part:

> Any employer who violates the provisions of * * * section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *

STATEMENT

These two suits were originally parts of actions brought on behalf of numerous longshoremen, named as plaintiffs, and "all employees and former employees of [petitioners] similarly situated," to enforce petitioners' alleged liability for overtime compensation under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, § 7 (a), 52 Stat. 1063, 29 U. S. C. 207 (a)) for work performed by the "plaintiffs" as longshoremen in the Port of New York during the period

October 24, 1938, to October 4, 1945 (R. 6, 13). By stipulations, the representative character of the actions was terminated, the claims of the twenty respondents were severed from the actions of the other plaintiffs and consolidated for purpose of immediate trial, and the claims of the other plaintiffs were left pending on the docket of the court, to be controlled by the "legal rules and principles established by * * * final disposition of the severed actions" (R. 2–3, 544–549, 592–593).[3] It was also stipulated that respondents were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act (R. 594).

The facts, fully set forth in the detailed findings of the trial judge (which, as the Circuit

[3] The twenty claims selected for immediate trial were chosen, on an examination of certain of petitioners' employment records, as presenting, in one or another of the workweeks involved, what was thought to be every possible combination of work pattern—with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. Thus, the legal rules established in the selected actions would be translatable to all the other pending cases. The work patterns of the selected claimants were, however, not intended to be typical or representative of those of their fellow claimants or of the longshore industry; the patterns in the industry as a whole are established by the statistical studies prepared for and introduced by government counsel and whose accuracy is stipulated (R. 606–608; Defendant's Exhibits D, E, and J).

Court of Appeals noted, are supported by the evidence and are not disputed (R. 657)), may be summarized as follows:

Employment in the longshore industry in the Port of New York is highly casual in character (R. 598–600). The amount of work available depends on the number of ships in port and the length of their stay and varies from day to day, week to week, and season to season (R. 601). The time when the work is to be done is determined by the employers (R. 599–600). With rare exceptions, longshoremen do not work regularly or continuously for any one company, but shift from employer to employer and from pier to pier, working when they want and when and where work is available (R. 599). At a pier where work is available, the men group themselves, normally at 7:55 a. m., 12:55 p. m., and 6:55 p. m., in a semicircle, or "shape," from which the hiring stevedore selects such men as he wants (R. 599). Selection from the "shape," however, carries with it no obligation (except for certain minimum work provisions of the collective bargaining agreements) as to how long the man selected will continue at work (R. 599–600). As a result of these characteristics, there are, as to individual longshoremen, no regularity as to hours of work, as to employment by particular stevedoring companies, or as to total daily or weekly hours of employment (R. 598–601, 614).

Nevertheless, the longshoremen (R. 602, 604), their union (the International Longshoremen's Association) (R. 604), the stevedoring companies (R. 602, 603–604), and the steamship companies (R. 603) have all consistently sought to limit the work as much as possible to the basic working day, that is, the scheduled "straight time" weekday hours. The objective of the men and their union, in this regard, has been to achieve the normal 8-hour day, generally prevalent in this country (R. 604); of the stevedoring companies, to avoid the reduction in profit consequent upon "overtime" work (R. 603–604); and of the steamship companies, to eliminate the added cost which would aggravate the already intense competition between American ships and ships of foreign registry (R. 603). To accomplish this purpose, the men have not infrequently refused to work at night unless it was absolutely necessary to do so and, through their union, have imposed the time and one-half "overtime" rates for such extraordinary work, in order to make it so expensive that employers would avoid it whenever possible (R. 604, 605). The stevedoring companies, for their part, commonly use auxiliary equipment and the largest number of day gangs within the vessel's limitations of space and equipment in order to concentrate the work as largely as possible into the daytime hours (R. 602). The steamship companies do not permit "overtime" to be

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worked except with their approval (R. 602); and in wartime, the permission of the Government was required (R. 603).

Thus, the 50 percent premium provided by contract for overtime work was "expressly designed to deter the penalized activity" (R. 590, 605, 612) and has proved to be an effective deterrent of "overtime" work and to be responsible for the high degree of concentration of longshore work in the Port of New York in the basic working day (R. 590, 612). It was neither a "method of increasing earnings" (R. 605), nor a "shift differential" to induce work in unattractive hours (R. 589–590, 605–606, 612).[1] These facts are

[1] The district court found that the historical development of the collective bargaining agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry (R. 612). Prior to the Fair Labor Standards Act, the court found, the word "overtime" had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of "overtime," which was also understood to cover hours outside a specified clock pattern. The "overtime" rate was usually one and one-half times the "straight time" rate. The purpose of the demand of organized labor in American industry for a penalty compensation for "overtime" was to discourage work beyond a certain number of hours a week and to discourage work during specified periods of the day. It was prompted by the laborer's desire for a shorter workday and was not generally intended as a method of increasing earnings (R. 604–605).

The district court also found that "overtime" rates are to be distinguished from "shift differentials," which are premium payments for work in a second or third shift where more than one shift is worked and which are usually 5 or 10

borne out by port-wide statistical studies (R. 606–608; Defendants' Exhibits D, E, and J), whose accuracy was stipulated by the parties and which show that, outside of the wartime period, from 75 to 80 percent of the work was performed during "straight time" hours; that from 73 to 86 percent of the work done during "overtime" periods was performed by men continuing to work after working "straight time" hours on the same day; and that only about 4 percent of all work was done by men who worked only at night.[3] During the

cents an hour more than the rate for the first shift. "Shift differentials" are large enough to attract workers to work during what are regarded as less desirable hours of the day and yet are not so large as to inhibit employers from the use of multiple shifts, whereas "overtime" rates are so large that they will inhibit or discourage an employer from working his men beyond a specified number of hours or during specified hours of the day (R. 605–606).

The collective agreements in the longshore industry did not employ the word "overtime" for all hours outside the basic working day until 1938, but since 1918, both the union and the employers, during their negotiations, continually referred to such hours as "overtime" (R. 611).

[3] The studies show the following division between "straight time" and "overtime" work in the Port of New York: During the period 1932 to 1937, of the *total man-hours worked*, 79.93 percent of the work was performed during "straight time" hours; 4.94 percent was performed on Saturday afternoons, Sundays, and holidays; and only 15.13 percent was performed between 5:00 p. m. and 8:00 a. m. on weekdays. In the ten-month period between October 24, 1938, the effective date of the Fair Labor Standards Act, and August 31, 1939, shortly before the outbreak of the war, 75.03 percent of the work was performed during "straight time" hours; 7.08 percent on Saturdays, Sundays, and holidays; and 17.89 percent between 5:00 p. m. and 8:00 a. m. on weekdays. During the last full year of war experience—namely, the last three quarters of

abnormal war period, the proportion of overtime and of persons working wholly or materially during overtime hours substantially increased, but since the end of hostilities, the business in the Port of New York has largely reverted to peacetime patterns (R. 603).

The employment records of the individual respondents, employed during 1944 and 1945, show that their work followed no regular patterns (R. 614). There were many weeks during which they were not employed by petitioners (*Id.*). They worked varying numbers of days in different weeks, and the number of hours on the days worked varied greatly (*Id*). All performed substantial portions of their work during "overtime" hours, and some of them did all of their work during such hours. (See table opposite R. 612.) During many weeks, they worked less than 40 hours; whereas in other weeks, they worked more than 40 hours for the same employers (R. 614).

1944 and the first quarter of 1945—the percentages, respectively, were 54.5, 20.5, and 25.0. Of the *total overtime work* performed between 5:00 p. m. and 8:00 a. m. on weekdays during the 1932–1937 period, 86.8 percent was performed by men who had held over, for periods of varying length, into the evening or night hours after having worked during the day, and only 13.2 percent by men who had not begun work until after 5:00 p. m. During the ten-month period noted above, the percentages, respectively, were 76.71 and 23.29. During the war period, they were, respectively, 55.5 and 44.5 percent. Expressed in terms of percentage of *total man hours worked* during each of the periods studied, the work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was 2.57, 4.17, and 11.1 percent in each of the three periods, respectively.

In accordance with the general arrangements for payment of longshoremen in the Port of New York, petitioners paid respondents the contractual "straight time" hourly rates for work performed during the specified "straight time" clock hours and the contractual "overtime" hourly rates for work performed during all other weekday hours and on Sundays and holidays (plus customary differentials for work performed in special capacities), regardless of whether respondents had worked more or less than a total of 8 hours in any one day or of 40 hours during the week; the one exception being that Saturday morning work, though "straight time" under the terms of the contract, was paid for at the "overtime" rate to the extent that such Saturday work exceeded 40 "straight time" hours in the workweek (R. 614).

On these findings, the district court concluded, as a matter of law, that the "straight time" hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act, except in certain minor respects (R. 617).* In so

* The court held that petitioners had improperly failed to compensate some of the respondents for overtime in workweeks in which some of their work was performed in special capacities or on penalty cargoes and with respect to some work performed by three respondents on Saturday mornings in excess of a 40-hour week (R. 617). To that extent, the judgments rendered in accordance with these holdings (R. 619–622) are not here in issue.

concluding the court deemed it appropriate to attribute substantial, if not controlling, significance to the provisions of those agreements in view of its findings: (1) that they did not establish "an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act" (R. 588); (2) that, on the contrary, they were "the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589); (3) that the legitimate objectives of the agreements were "decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation" (R. 588); (4) that the higher contractual "overtime" rates were not "shift differentials," but rather true overtime rates "designed to curtail, and [which] measurably succeeded in curtailing, excessive and abnormal hours" (R. 590); and (5) that the acceptance of respondents' contentions "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial portion of American industry" (R. 586).

The court below disagreed. It held that agreements other than the type involved in *Walling* v. *Belo Corp.*, 316 U. S. 624, "whether or not the result of collective bargaining, cannot, by their terms, determine what is the 'regular rate' named

in the Act" and cited, as authority for that statement, this Court's ruling in *149 Madison Avenue Corp.* v. *Asselta,* 331 U. S. 199. Although it accepted as correct all the findings of the trial court, it drew inferences from them conflicting with those adduced by the trial judge and determined that the "regular rate" in the longshore industry was not the "straight time" rate established by the collective bargaining agreements, but rather the quotient arrived at by dividing the total pay of each longshoreman each week by the total number of hours worked by him during that week (R. 654–659).

A petition for rehearing and to shape the mandate, or in the alternative, for a stay of mandate, filed by petitioners (R. 667–670), was denied by the Circuit Court of Appeals (R. 670–671). In so ruling, the court directed that its decision remanding the suits to the district court "should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal Act of 1947," which had become effective on May 14, 1947 (R. 671).

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, under which respondents and other

longshoremen were employed by petitioners during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

2. In failing to hold that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit satisfied the requirements of Section 7 of the Fair Labor Standards Act of 1938, with respect to payment of overtime compensation.

3. In holding that the "straight time" hourly rates set forth in such collective bargaining agreements were not the "regular rates," within the meaning of Section 7 of the Fair Labor Standards Act of 1938, at which respondents and other longshoremen were employed by petitioners during the period in suit, and in holding that the findings of the trial judge support that conclusion.

4. In holding that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit failed to satisfy the requirements of Section 7 of the Fair Labor Standards Act of 1938 with respect to payment of overtime compensation, and in holding that the findings of the trial judge support that conclusion.

5. In holding that rates equivalent to one and one-half times the "straight time" rates established in such collective bargaining agreements could not be excluded in computing the "regular rates" under Section 7 of the Fair Labor Standards Act unless paid for work during "hours not normally worked," and in holding that the hours between 5:00 p. m. and 8:00 a. m. on weekdays, and on Saturday afternoons, Sundays, and holidays were hours normally worked, and in holding that the findings of the trial judge support those conclusions.

6. In holding that the "regular rate" at which each of the respondents was employed by petitioners during each of the weeks of his employment during the period in suit was the quotient determined by dividing the total pay of each respondent each week by the total number of hours worked by him during that week; and in holding that the findings of the trial judge support that conclusion.

REASONS FOR GRANTING THE WRIT

1. These cases present an issue which has not before been passed on by this Court. In our view, the answer provided by the court below is in error. But in any event, the great urgency of the issue and the necessity for its prompt and final determination by this Court cannot be questioned.

An early ruling by this Court is essential not only because of the great pecuniary liability to

which the United States would be subjected under the decision below, but, also, because of the importance of determining for the future the status under the Fair Labor Standards Act of the contractual arrangement which has long prevailed in the longshore industry throughout the United States, and the public interest in the restoration of certainty and stability in the labor relations of the longshore industry and those other industries which have been affected by that decision.

The operation of all ships during World War II was taken over by the Government, and substantially all stevedoring during that period was performed for its account pursuant to "cost plus" contracts (R. 603). By these contracts, the United States is obligated to pay practically all such judgments as may be rendered against the stevedoring companies in the present suits and in the several hundred similar longshore suits now pending in the courts.[1] Before the announcement of the decision below, 118 suits similar to the present cases had been instituted on behalf of thousands of longshoremen. Since that time, approximately 100 new complaints, one of which has as many as 12,000 named plaintiffs, have been

[1] The Portal-to-Portal Act (Public Law 49, 80th Cong., 1st sess.), may, to an extent now unascertainable, diminish the amount of damages which may be recoverable in these suits. See §§ 6, 9, 11. That statute, however, does not remove or resolve the problem, which is of great significance to the industries affected for the future, whether the type of contract here involved is in conformance with Section 7 of the Fair Labor Standards Act.

filed. These hundreds of cases, which have arisen in five circuits, for the most part are lying dormant, awaiting action by this Court on these two suits.

An equally important consideration is that the decision below would disrupt the long-standing overtime compensation provisions in the longshore agreements and in numerous similar collective bargaining agreements in other industries, and may thus inspire costly labor unrest in a large sector of the nation's economy. Not only the longshore industry in the Port of New York is affected by the ruling below. Most ports of the United States, Hawaii, and Puerto Rico,* have long been controlled by collective agreements which, though they may differ in some minor details, in essence establish work patterns similar to that here involved. And a nation-wide survey made by the Industrial Relations Branch of the Bureau of Labor Statistics covering 437 union agreements in effect on July 1, 1946, in 31 industries employing slightly over two million workers, discloses that contracts establishing work patterns similar to those involved in the longshore industry were then in effect in portions of the automobile, canning and preserving, cotton textile, men's clothing, nonferrous metal, smelting

* See, to the same effect as the decision below, *Ferrer* v. *Waterman Steamship Co.*, 70 F. Supp. 1 (D. C. Puerto Rico), relating to the longshore agreements in Puerto Rico.

and refining, shipbuilding, tobacco, and trucking industries.*

2. Review of the judgments below is necessary not only because of the importance of the issue involved but also because, in our view, the decision below is incorrect. The lower court's assimilation of the New York longshoremen's collective bargaining agreements to contractual arrangements struck down in other cases previously before this Court seems wholly unwarranted. The arrangements for compensation here in issue differ radically from those in the split-day plan of compensation, held invalid in *Walling* v. *Helmerich & Payne*, 323 U. S. 37, and in the piecework guarantee schemes rejected in *Walling* v. *Youngerman-Reynolds Hardwood Company, Inc.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. To compute the "straight time" rates prescribed in the longshore agreements, one need not resort to "ingenious mathematical manipulations" (*Walling* v. *Helmerich & Payne, supra,* at 41); neither are they computed "in a wholly unrealistic and artifical manner so as to negate the statutory purposes" (*Ibid.* at 42); nor are they "completely unrelated to the payments actually and normally received each week by the employees" (*Walling* v. *Younger-*

* That the rule established by the decision below will, unless corrected, be applied to such other industries has already become evident. See *Roland Electrical Co.* v. *Black*, decided August 12, 1947 (C. C. A. 4), 7 WH Cases 167, pending on petition for certiorari on another issue *sub nom. Black* v. *Roland Electrical Co.*, No. 340.

man-Reynolds Hardwood Company, Inc., supra, at 426). On the contrary, the collective bargaining agreements in the longshore industry are products of an honest effort to decasualize employment in the industry and to accomplish the very objectives of the Fair Labor Standards Act, that is, the confinement of the work as largely as the nature of the industry will permit, to an 8-hour day and a 40-hour week. The "straight time" rates fixed by the longshore contracts are set forth in simple dollar-and-cents terms, are designed realistically to compensate the employees fully and equally for all work performed during the basic working day, and bear a definite relation to the weekly compensation earned by such employees.

That the "overtime" rates established for work during periods other than the scheduled hours on weekdays are also specific, and that they may be paid for work performed prior to the expiration of the 40-hour workweek and also in weeks where less than 40 hours are worked, are not reasons for treating them as "regular rates" and rejecting the "straight time" rates as the "regular rates" for purposes of Section 7 of the Fair Labor Standards Act. The "overtime" rates agreed upon were, with minor exceptions, one and one-half times the "straight time" rates, the overriding level conventionally adopted by organized American industry and in federal and state legislation as a true deterrent overtime premium. These

"overtime" rates were fixed at that level at the insistence of the longshoremen's union and for the purpose, consonant with the Congressional purpose expressed in the Fair Labor Standards Act, to deter the employers from working their employees during periods other than the basic working day and work week (R. 598, 604, 608–609, 611, 612). It is undisputed that the stevedoring companies so understood the overtime premium—for a true overtime penalty—and that it did effectively serve to induce a concentration of work during the normal daytime hours (R. 590, 601, 602, 603–604, 612). In these circumstances, we submit that to treat the "overtime" rates as merely other "regular rates" is to pervert the intent of the parties clearly expressed in a binding contract and for no compelling reason apparent in the letter or design of the statute.

The decision below is likewise unsupportable on the assumption that the "overtime" premium was in effect a "shift differential." The trial judge's finding that it was not such a differential (R. 589–590) is clearly justified in light of his subsidiary findings, based on uncontradicted testimony: (1) that a shift differential "is an amount added to the normal rate of compensation which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts" (R. 605); (2) that the "overtime" rates in these cases "were designed to curtail, and measurably succeeded in

curtailing" work outside the scheduled hours on weekdays (R. 590); (3) that shift differentials are usually 5 or 10 cents per hour and seldom exceed 15 cents an hour, whereas overtime premiums are generally 50 percent of the normal rate (R. 606); and in light of the testimony that shift differentials never exist except when there are regularly established shifts of fixed duration (R. 332, 334, 356) which the evidence and statistics show was not the case in this industry.[10]

Nor is there any significance in the fact that some of respondents may have been employed solely or mainly during "overtime" periods. The port-wide statistical studies (R. 606–608; Defendants' Exhibits D, E, and J), whose accuracy was stipulated, clearly demonstrate the exceptional character of such cases and the relatively small proportion of the work performed by men who worked only at night. See n. 5, pp. 9–10, *supra*. Except for the war period, the predominant percentage of "overtime" work was performed by men who had held over into the evening and night hours after having worked during

[10] *Cabunac* v. *National Terminals Corporation*, 139 F. 2d 853 (C. C. A. 7), relied on by the court below (R. 657–658), is distinguishable from the present suits on the ground that the difference between the so-called "straight time" rate and the "overtime" rate in that case was apparently only 10 cents per hour (*ibid.*, at 854), and was intended as an inducement to accept employment at unattractive hours. *I. L. A.* v. *National Terminals Corp.*, 50 F. Supp. 26, 29 (E. D. Wisc.). Furthermore, the issue as to whether the differential was a true overtime penalty, foremost here, was only a subsidiary question in the *Cabunac* case.

the basic working day. Moreover, even during the war period, the majority of the night workers were hold-overs from daytime work, and the concentration of work during the basic working day even during that period of emergency was 2.4 times the concentration of work during the remaining 16 hours of the day. The work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was no more than 4.17 percent of the total man hours worked during the periods prior to the outbreak of the war, and even during the war years did not far exceed 11 percent. Thus, the "overtime" rate, designed as a deterrent against overtime work, accomplished its purpose. The "normal, non-overtime workweek" (*Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40) in the lor gshore industry consequently is actually and really the week composed of the scheduled hours on weekdays prescribed by the contracts, and the "regular rates" are the actual "payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime," *i. e.*, the contractual "straight time" rates. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430.

In these circumstances, there is no reason, which we can conceive, for ignoring the long-standing collective-bargaining agreements here involved, as the court below has done. Of course contracts which establish artificial rates and which are de-

signed to evade the purpose of the Fair Labor Standards Act, are to be condemned. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199. But the longshore agreements are not such contracts. They have governed the longshore industry since 1916; they long antedate the Fair Labor Standards Act; and they seem to conform with every requirement of the Act. Congress did not intend that collective bargaining be thwarted so easily.

Even where overtime compensation arrangements postdated the Act and were astutely devised to retain prior rates of pay, this Court has upheld them as valid. *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17. As the Court said, in the *Belo case* (316 U. S. at 634–635):

> The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of "regular rate" when Congress has failed to provide one. * * * that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text * * *. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. * * *

Finally, the decision below places unrealistic emphasis on the work patterns in the longshore industry during the war period, when much work was done on the docks in hours other than the basic working day and when some men worked only during such "overtime" hours. The abnormal volume of such work was due to the exigencies of total warfare, and the governmental policy not only to encourage but to require overtime work. Thus, Executive Order 9301 (8 F. R. 1825, 29 U. S. C., Supp. IV, 207 note) established a minimum workweek of 48 hours for the duration of the war. For that period, in effect, the purpose of the Fair Labor Standards Act to limit overtime work was suspended and the country's policy and program was so reversed as to compel excessive overtime. It is a troublesome question then, of much consequence not only to the longshore industry but to all industries, whether the work patterns established during wartime, when overtime work was vigorously thrust upon labor and management by the Government, should control the determination of the "regular rates" for purposes of computing the compensation to be paid for such overtime in the succeeding years of peace. As Judge Rifkind suggests (R. 585–586), the rule established by the court below might well render unlawful the almost universal arrange-

ments for overtime compensation in American industry under the wartime 48-hour week.[11]

3. The Administrator of the Wage and Hour Division believes that proper consideration was given by the court below to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct.

The public pronouncements of the Administrator declare that overtime compensation for work outside the "normal or regular working hours," such as the usual Sunday or holiday work, may be credited toward overtime due, and not included in the "regular rate of pay." (See R. 658–659.) The court below concluded that in these cases the work performed outside of the "straight time" hours was "not 'outside the usual or regular working hours'" (R. 659).[12] It is suggested,

[11] It is noteworthy, too, that the decision below casts considerable doubt on the validity of the almost universal practice in organized American industry to treat Sunday and holiday work as overtime work and the higher rates payable for such work as true punitive overtime.

[12] Authoritative public interpretations of the Administrator are not explicit on this point and have furnished the basis for conflicting arguments as to the administrative position. See R. 658–659. A letter written by the Administrator in 1943 to the Cleveland Stevedore Co. states that the non-straight-time hours worked by longshoremen are to be included within the employees' hours (R. 559). A different position had seemingly been previously expressed in 1938 in a letter written to the Industrial Association of San Francisco by a regional attorney (R. 574–577).

however, that whether or not the overtime here is being performed outside normal or regular working hours may properly be determined only on the basis of the operations in the longshore industry as a whole during normal peacetime conditions, under which overtime work is kept to a minimum. The proportion of overtime work during peacetime—20 to 25%—is not sufficient to make such work, which the industry sought to avoid insofar as possible, regular or normal.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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